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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 1083.

AL WILLIAMS, *et al.*,

Petitioners,

vs.

MICHAEL J. FANNING, *et al.*,

Defendants.

PETITIONERS' BRIEF ON THE MERITS.

Statement of Facts.

Petitioners filed suit in the District Court to enjoin the local Postmaster at Los Angeles, California, from enforcing a fraud order [R. 257] of the Postmaster General purporting to have been issued under the so-called Postal Fraud Order Statutes (U. S. C. A., Title 39, Secs. 259, 732; R. S. 3929, 4041). Petitioners sought injunctive relief upon the ground that the Postmaster General had exceeded his authority in issuing the order upon opinion evidence alone and without substantial evidence of actual fraud in fact [R. 259, 264-265], and by leave of Court filed their Amended Complaint [R. 230, 231-270] in order to eliminate all Constitutional questions.

Respondent moved to dismiss the action upon the ground that petitioners had failed to state a claim upon which

relief could be granted [R. 229]. The District Court reluctantly granted the motion upon the ground that the Postmaster General is an indispensable party to the action [R. 276], basing the ruling solely upon the case of *Neher v. Harwood*, 128 F. (2d) 846, with which the Court stated it did not agree but felt bound to follow [R. 274, 275].

On December 6, 1946, the Circuit Court of Appeals for the Ninth Circuit rendered its opinion *per curiam* affirming the judgment of the District Court upon the authority of *Neher v. Harwood, supra.*

On April 14, 1947, this Court granted the Petition herein for a Writ of Certiorari, limited, however, to the first question presented by the Petition for the Writ [R. 289], which reads as follows [p. 4]:

> "1. When the authority of the Postmaster General to issue a fraud order is the ultimate question raised by the complaint, is he an indispensable party to an action against the local Postmaster to enjoin the enforcement of the order?"

Petitioners rely not only upon the allegations in their Amended Complaint [R. 231-270] which must here be assumed to be true, but also upon the complete transcript of evidence taken before the Post Office Department [R. 44-218], and the Findings of Fact of the Postmaster General [R. 219-228] which are, respectively, "Exhibit A" and "Exhibit B," attached to the Amended Complaint, together with the fraud order in question which is therein set forth in full [R. 257-258].

Argument.

Inasmuch as the judgments of both the District and Circuit Courts below were based squarely upon the case of *Neher v. Harwood*, 128 F. (2d) 846 (9th Cir.), consideration of that decision seems appropriate.

Analysis of Neher v. Harwood.

The plaintiff in that case was engaged in the operation of a "cosmic generator" into which he placed a prayer card containing the customer's name, claiming that the generator gathered health waves or forces which were distributed with beneficial effect upon the health of the customer, and used the mails in selling the service for individual and family treatment.

Plaintiff claimed that the Postmaster General acted beyond his jurisdiction in issuing a fraud order and sought to eijoin the local postmaster from enforcing it. No constitutional question was involved. The defendant moved to dismiss upon the ground that the Postmaster General was an indispensable party.

The usual hearing was had before the Post Office Department at which a customer or purchaser of plaintiff's prayer card service gave his testimony to the effect that he had used the service and had derived no benefit whatever therefrom. In this important particular the case differs from the one now before this Court.

In the beginning the opinion in *Neher v. Harwood, supra*, makes the following statement (p. 847):

> "In view of the fact that there is confusion in Courts as to the necessity of joining superior officers when acts of subordinates are sought to be enjoined

we have made a fairly thorough examination of the decisions and opinions upon the subject in an attempt to discover a principle which will largely reconcile them."

Then follows an extended consideration of *Warner Valley Stock Company v. Smith*, 165 U. S. 28; *Gnerich v. Rutter*, 265 U. S. 388; *Webster v. Fall*, 266 U. S. 507; *Moody v. Johnston*, 9 Cir., 66 F. (2d) 999; *Berdie v. Kurtz*, 9 Cir., 75 F. (2d) 898; *Ferris v. Wilbur, Secretary of the Navy, et al.*, 27 F. (2d) 262; *Yarnell v. Hillsborough Packing Company*, 70 F. (2d) 435; *Ryan v. Amazon Petroleum Corporation*, 71 F. (2d) 1; *Rood v. Goodman*, 83 F. (2d) 28; *National Conference on Legalizing Lotteries, Inc., v. Goldman*, 85 F. (2d) 66, and *Colorado v. Toll*, 268 U. S. 228. Referring to *Colorado v. Toll, supra*, and in distinguishing it from *Webster v. Fall, supra*, and *Gnerich v. Rutter, supra*, the Court expresses its conclusions in the following language (1), page 849:

"(1) The plaintiff in this case, it is clearly seen, was not claiming that the superior officer had abused a discretion legally vested in him, but rather that he had no statutory authority whatsoever, to issue the regulation complained of.

"The confusion as to this case and the *Gnerich* and *Webster* cases now clears. The Supreme Court in *Colorado v. Toll* did not overrule these two former cases, but instead properly and logically discerned the principle upon which they differed. In the two former

cases the superior officer had acted under a statute which was not attacked as unconstitutional, but it was contended that the superior had in some manner abused his discretion and in such circumstances it was held that he should be made a party to the action in order to defend his direction and regulations. Where he was without authority to act at all in the premises his actions assuming to authorize action by the subordinate were of no validity and left the subordinate as the actor subject to restraint."

The Court then further states (p. 851):

"It would serve no useful purpose to go into all of the other cases on the subject in great detail. The following, however, are cases in which the plaintiff attacked the very authority of the superior officer to act or issue the regulations complained of, as contrasted with an attack on the regulations as such; and where the superior officer was held not to be an indispensable party. Hill v. Darger, *et al.*, D. C. Cal., 8 F. Supp. 189; Eastman v. United States, D. C. Wash., 28 F. Supp. 807."

"Cases in which the authority of the superior officer was not attacked, and where the superior officer was held to be an indispensable party are: Wheeler v. Farley, D. C. Cal., 7 F. Supp. 433; Redlands Foothill Growers *et al.* v. Jacobs, D. C., 30 F. Supp. 995; Hawthorne v. Fisher, D. C. Tex., 33 F. Supp. 891; Barr v. Rhodes, D. C. Ky., 35 F. Supp. 223; Scientific Mfg. Co. v. Walker, D. C. Pa., 40 F. Supp. 465; Acret v. Harwood, D. C. Cal., 41 F. Supp. 492."

The Court holds that no cause of action was stated.

The decision conveys the impression that the authority of the Postmaster General cannot be questioned except upon constitutional grounds, which, if true, would render it impossible to question his authority at all, for, as stated by Mr. Justice Holmes and Mr. Justice Brandeis dissenting in the case of *Leach v. Carlisle*, 258 U. S. 138, 140:

> "The Statute under which fraud orders are issued by the Postmaster General has been decided or said to be valid, so many times that it may be too late to expect a contrary decision."

The net result of the decision is an enunciation of the rule already established by this Court that the superior is never an indispensable party to the action when the plaintiff attacks his authority to act or to issue the order or regulation complained of, which rule has long prevailed, being laid down by this Court in *Colorada v. Toll*, 268 U. S. 228, 230, which was an action to enjoin the superintendent of a National Park from enforcing certain regulations for the government of the park. The Secretary of the Interior, who was the superior official, was not joined in the action, the Court expressly deciding that a bill in equity was the proper remedy and that it could be pursued without joining the superior officer. The question presented by the complaint was whether or not the

Park Superintendent was doing something which he had no authority to do in attempting to enforce certain regulations of the Department of the Interior. Mr. Justice Holmes delivered the opinion of the Court which contains the following statement at page 230:

> "The object of the bill is to restrain an individual from doing acts that it is alleged that he had no authority to do, and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States. Missouri v. Holland, 252 U. S. 416, 431; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620."

The rule has been uniformly followed and is based, of course, on the proposition that, when the authority of the superior is attacked, the question presented is one of law, the decision of which does not require his presence.

The cases of *Varney v. Warehime*, 147 F. (2d) 238, 242, and *Greer v. Cline*, 148 F. (2d) 380, both from the Sixth Circuit and quoted at length on pages 37, 38 and 39 of Petitioners' Brief Supporting the Petition, are more recent cases following the rule.

Petitioners' Complaint Is an Attack Upon the Authority of the Postmaster General to Issue the Fraud Order, Upon the Ground That He Issued the Order Solely Upon Opinion Evidence and Without Substantial Evidence of Actual Fraud in Fact.

After setting forth the complete record before the Postoffice Department, Paragraphs XX and XXVI of the Amended Complaint appearing on pages 259 and 264, respectively, of the Record, read as follows:

"XX.

That by reason of being unsupported by any substantial evidence in fact, and by reason of the facts herein alleged, said order is void and issued without and beyond the authority and jurisdiction of the Postmaster General, and of said Post Office Department, and beyond the authority conferred upon them by the Acts of Congress."

"XXVI.

That, . . . the said order is void and of no effect and was issued without substantial evidence in fact and beyond the jurisdiction of the Post Office Department and of the Postmaster General and beyond the authority conferred or intended to be conferred by Congress."

The Complaint is in no sense a claim of abuse of discretion for there is no discretion when authority is lacking and it has no other basis and presents no other question than the authority of the Postmaster General to issue the order and his authority is attacked upon the

ground that the order is based solely upon opinion evidence and is therefore void.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, and more than one hundred cases in which it is cited and approved.

That the Postmaster General is without authority to issue a fraud order based upon opinion evidence alone is considered at length on pages 29 to 36, both inclusive, of Petitioners' Supporting Brief.

That he has done so in this case is clearly evident from an examination of the complete record before the Post Office Department [R. pp. 44-218], with which conclusion the District Court below agreed [R. pp. 272-273].

Conclusion.

It would seem that the *McAnnulty* case, *supra*, in deciding that the Postmaster General has no authority to issue a fraud order based only upon opinion evidence, harmonizes all of the decisions on the question of his presence as an indispensable party. The decision in that and in every similar case is one of authority and whether or not he acted without authority and issued a fraud order upon mere expressions of opinion and without substantial evidence of actual fraud in fact is a question subject for review by the courts, and in no such case is the Postmaster General an indispensable party and his personal presence would not assist him or anyone else and would not be likely even in Washington, the records

of the Postoffice Department being all that are required to enable the Court to decide whether or not the evidence was substantial and factual, or mere expressions of opinion.

Beyond question the Postmaster General is not an indispensable party to an inquiry into his authority. Equally without question, he is without authority to issue a fraud order based upon opinion evidence alone. It naturally follows that he is not an indispensable party to an inquiry to determine whether or not he issued a fraud order without having before him substantial evidence of actual fraud in fact. Appellants believe that this is such an action and his authority is expressly questioned and put in issue by the allegations of the complaint.

Petitioners respectfully submit that the record clearly shows that the Postmaster General issued the fraud order in question upon opinion evidence alone; that the complaint presents an attack upon the authority of the Postmaster General to issue the order and that he is therefore not an indispensable party to the action and the motion to dismiss should have been denied.

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